SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 674

JOHN THOMAS, WILLIAM McCOY, JOHN SALTERS, ISAAC SIZEMORE, RAY TRANTHAM, ELLIS COLEMAN, JR., LEE LOONEY, JOHN YATES, and CHARLES TAYLOR, *Petitioners*,

v.

CONSOLIDATION COAL COMPANY, a corporation (POCAHONTAS FUEL COMPANY DIVISION) and THE INTERNATIONAL UNION, UNITED MINE WORKERS OF AMERICA, an unincorporated association (District 29) and LOCAL UNION No. 9690, UNITED MINE WORKERS OF AMERICA, an unincorporated association, *Respondents*.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF UNION RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit appears in 380 F.2d 69. The Fourth Circuit's Order pertaining to the re-hearing petition, correctly set forth in the certiorari petition (Pet. App. 41), is as yet unreported. Respondent Unions disagree with Petitioners' statement (Pet. 1-2) that the district court's opinion is "not pertinent to the issue"; and it is printed in Appendix "A" hereto.

Omitted from the certiorari petition concerning Opinions Below is the Order of the Supreme Court of Appeals of West Virginia, entered May 24, 1965, denying Petitioners their application for an appeal from the judgment of the Circuit Court of Wyoming County, West Virginia, rendered March 8, 1965. That Order, referred to in the Fourth Circuit's Opinion (Pet. App. 19), is printed herein in Appendix A, page 6a.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed by Petitioners (Pet. 3), Union Respondents (see Footnote 1 herein) direct this Court's attention to Constitution of West Virginia, Article VIII, Section 5.

COUNTERSTATEMENT OF QUESTION PRESENTED

In an action brought in a state circuit court charging an employer with wrongful discharge under a collective bargaining agreement and the union and the employer with fraud, and jurisdiction was asserted under Section 301(a) of the Labor Management Relations Act, 1947; and that court sustained dismissal motions of all defendants by entry of a dismissal order without assigning specific reasons therefor, and subsequently the highest appellate court of that state, also without opinion, denied plaintiffs an appeal from the dismissal order, and plaintiffs did not seek a review thereof in this Court, is a subsequent action brought in a federal district court in the same state under the same statute by the same plaintiffs involving substantially the same allegations and issues, the same relief against the same parties or their privies, barred under the rule of *res judicata*?

COUNTERSTATEMENT OF THE CASE

1. The Kind of Action and the Courts' Judgments.

Nine alleged former employees of Consolidation Coal Company[1] and members of Local 9690, United Mine Workers of America, instituted the instant action in the United States District Court for the Southern District of West Virginia under Section 301(a), Labor Management Relations Act, 1947 (called "Act") for alleged wrongful discharges against Consolidation and "The International Union, United Mine Workers of America, an unincorporated association", seeking judgment "against the defendants vacating and setting aside the arbitration decision of" an umpire and "declaring the same of no legal force and effect" or a money judgment against Consolidation in favor of each plaintiff (R. 3-13).

The district court on April 4, 1966, sustained dismissal motions filed by Consolidation and the Unions, respectively, on the ground that an umpire's decision will be reviewed only where it is alleged that such decision was procured by fraud and that plaintiffs' allegations did not meet the particularity requirements of Rule 9(b), Federal Rules of Civil Procedure (Pet. App. 16). Thereafter, but prior to entry of a dismissal order, Petitioners sought on April 29, 1966, but were denied (R. 59-60), leave to file an amended complaint (R. 44, 46-47) because the district court concluded the amendments "when compared with the original complaint, reveal no substantial difference in the basic grievances originally complained of" (Pet. App. 16, 18). The same order (R. 59-60) sustained the dismissal motions of the respective Respondents and dismissed Petitioners' action "with prejudice" (Pet. App. 16).

[1] Consolidation Coal Company is herein called either "Consolidation" or "Company"; collectively the several unions are referred to herein as "Unions" and the terms "Petitioners" and "plaintiffs" are used interchangeably. Emphases herein are supplied. Page references following the symbol "R." are to the transcript certified by the Fourth Circuit's Clerk to this Court.

Upon appeal, the United States Court of Appeals for the Fourth Circuit directed counsel to file supplemental briefs on the issue of *res judicata;* and thereafter affirmed the district court's dismissal (Pet. App. 40). The Fourth Circuit also denied Petitioners' re-hearing petition, finding no ground asserted therein not considered upon the initial argument in the case (Pet. App. 41).

2. The Original Complaint's Allegations in the District Court.[2]

Prior to September 21, 1962, Consolidation (and its predecessor, Pocahontas Fuel Company) and "The International Union, United Mine Workers of America . . . (District 29)" were signatories to the National Bituminous Coal Wage Agreement. Discharge cases were processed under the Settlement of Local and District Disputes section of the agreement; the fifth step provided for submission of the dispute to an umpire agreed upon by the operator and "the duly designated representatives of the United Mine Workers of America"; and the umpire decision "shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement".

Prior to September 21, 1962, Petitioners were employed by Pocahontas Fuel at its Itmann mine under "a continuing employment contract", which Consolidation as Pocahontas' successor at Itmann "accepted and ratified".

Plaintiffs accumulated seniority. Consolidation acquired another mine adjacent to Itmann and then attempted to apply a seniority program improper as to the older Itmann men, and in collaboration with the International Union, United Mine Workers of America, "merged" the seniority lists of Local 9690 and the former

[2]The original complaint is found in the certified record filed in this Court's Clerk's office, pages 3-13.

local of the other mine.[3] A work stoppage occurred, with attendant picketing.

On September 24, 1962, Consolidation gave discharge notices to Petitioners but stated it would permit dischargees to work under protest until grievances were processed through arbitration procedure in the labor agreement.

It did not discharge any others connected with the picket line. The discharges were not only "arbitrary, capricious, malicious, wrongful and unjust" but "in violation of said collective bargaining agreement" either because of lawful union activity on the picket line, in which case they were "unjustifiably discriminatory", or, because of Petitioners' consulting with an attorney for advice concerning seniority, in which event the discharges were "capricious and unjust".

Subsequent processing of their grievance claims, Petitioners charged, was not in good faith on Company's part or that of "union representatives" but was *fraudulent;* the grievance procedure was used as an instrument to violate the labor agreement "by wilful and malicious obstruction of plaintiffs' lawful demand for correction of the wrongful discharges"; and resulted "in a fraudulently obtained and fraudulently-induced Umpire's decision affirming said discharges".

Consolidation agents "wilfully, maliciously and unlawfully threatened" Local and District 29 representatives and Petitioners with suits and penalties and "thereby fraudulently misled, cowed and browbeat plaintiffs and said union representatives" into waiving their lawful right and duty to present the true and necessary evidence to the "determining agent or authority at each stage of the grievance procedure" and under such influence, the Mine

[3]This is the sole allegation as to "The International Union, United Mine Workers of America."

Committee and District 29 representatives "conspired with" Consolidation agents to withhold pertinent information from the conferring committees, the Joint Board and the Umpire, and omit a fair and full presentation of evidence in support of Petitioners' claim so that the discharges would be affirmed by a Joint Board or an Umpire.

As a result of such threats and conspiracy, Consolidation was permitted to create a "record" which did not show the work stoppage as a concerted union activity; that Petitioners' discharges were discriminatory, arbitrary and capricious; and that Petitioners had not led, instigated, caused or called the strike, the reason for Petitioners' discharge was lawful union activity concerning seniority, all of which Consolidation knew. To the contrary, Consolidation was permitted to create a "record" of false accusations against Petitioners, false intimations of non-existent violence, and the impression that Petitioners were leaders of the wildcat strikes. Further, the "record" was submitted by Consolidation to an umpire "selected by said conspirators" and Petitioners were advised to refuse to testify when the umpire would offer them an opportunity so to do. Petitioners relied thereon in good faith but now say that the grievance procedure "was wilfully and fraudulently used to 'frame' them", by reason whereof "it is void and should be so declared" by a proper order to vacate the same.

Petitioners further charged that Consolidation, pending final discharges, further to cow and browbeat Petitioners and their union representatives, maliciously posted Petitioners' names as intended dischargees to ruin their individual credit and good names.

3. Relief Sought by Petitioners.

Petitioners demanded judgment "against the defendants vacating and setting aside" the umpire's decision, holding it a nullity and ordering "a proper arbitration

hearing with full protection of plaintiffs' rights" *or* that compensatory and punitive damages be awarded each Petitioner against Consolidation (R. 12-13).

4. Unions' Motions to Dismiss in the District Court.

Dismissal motions filed by Unions assigned the following grounds: (1) *Res adjudicata;* (2) preemption; (3) failure to state a claim against defendants; (4) lack of jurisdiction of the subject matter under Section 301, Labor Management Relations Act, 1947; (5) Unions as unincorporated labor unions may not be sued as such on a common law tort claim in West Virginia, by reason whereof the district court lacked jurisdiction both as to Unions and the subject matter of the action; (6) Rule 17(b), Federal Rules of Civil Procedure, did not give the district court jurisdiction either as to Unions or the action's subject matter; (7) lack of diversity of citizenship; (8) statute of limitations; (9) and (10) failure to comply with Rules 9(b) and 8(a)(2), Federal Rules of Civil Procedure (R. 19, 26, 32).

5. The District Court's Memorandum Opinion.

The district court's Memorandum Opinion (*ante,* p. 1), sustaining dismissal motions, observed that "if the arbitrator or umpire were actually deceived as a result of fraudulent conduct" on Respondents' part "then we would have no other choice but to vacate the decision", but the district court's Opinion continued, "However, *from a careful review of the averments of fraudulent conspiracy among the defendants as alleged in the complaint, we must hold that they are insufficient, in that they are not made with the degree of certainty, particularity, and detail that is required" under Rule 9(b), Federal Rules.* The Opinion further recited the complaint "merely deals with conclusions; in essence stating that due to the conspiracy, the corporation was able to create

a record before the umpire that contained grossly false accusations against the plaintiffs, false intimations of non-existent violence and the impression that plaintiffs were leaders of wildcat strikes".

The Opinion noted that "the fact that a settlement of this dispute was not made at the fourth stage of the grievance proceedings, which only involved the alleged fraudulent parties, tends to negate rather than substantiate intent of fraud and conspiracy on the part of the defendants".

Observing further that fraud should be alleged with particularity where Petitioners seek to attack collaterally the decision of an umpire, binding upon the parties under the terms of the labor agreement, which had been approved in effect by a state court decision, the Opinion finalized its reasons thus: "Believing, therefore, that the Federal policy is to uphold the decisions of the umpires in arbitration decisions wherever possible and further believing that plaintiffs' averments of fraudulent conspiracy among the defendants were not alleged with sufficient particularity so as to necessitate disturbance of the final decision, it is, accordingly, not subject to review by this court".

6. Petitioners Sought, But Were Denied, Leave to File an Amended Complaint in the District Court.

On April 29, 1966, Petitioners sought leave to file an Amended Complaint by adding paragraph 6A. Leave was denied, the June 27, 1966 order reciting that the "*changes, however, when compared with the original complaint, reveal no substantial difference in the basic grievances originally complained of.* Their essence is that there was a fraudulent conspiracy between the union and the employer—precisely as charged in the original complaint—and *the factual allegations to support them are not materially different from those contained in the original*

complaint. This being true, the motion to amend must be denied, Cf. *Williams* v. *Lewis,* 342 F.2d 727 (4th Cir. 1965). It is so ORDERED". In its June 27 order, the district court dismissed the action "with prejudice to the plaintiffs". As already noted, upon Petitioners' appeal to the Fourth Circuit, that Court affirmed the district court's dismissal.

7. Res Judicata: State Court Proceedings.

As already indicated, Respondent Unions' motions to dismiss included the ground of *res judicata (ante,* p. 7). Since the certiorari petition does not challenge the Fourth Circuit's statement that "There is no dispute concerning the facts in this case which are relevant to the claim of *res judicata*" (Pet. App. 17-18), Respondents quote that court's recitals pertaining to the state court proceedings (Pet. App. 18-20):

"On February 21, 1964, the same nine plaintiffs herein instituted an action in the Circuit Court of Wyoming County, West Virginia,[4] against the same defendants herein. As in this case, both the complaint and the amended complaint later filed in the State Court allege that plaintiffs were wrongfully discharged from their jobs by the Company and that the decision of the umpire in arbitrating the dispute in connection with their discharges was fraudulently obtained by a conspiracy of the Company and the Union. Both complaints filed in the State Court, as well as the complaint filed by the plaintiffs in the District Court below and the proposed amended complaint in that Court, contain substantially the same factual allegations. And in the State Court, as here, plaintiffs sought to set aside and vacate the decision of the umpire and sought judgment for compensatory and punitive damages against defendants.

[4] "Hereinafter referred to as the 'State Court'".

"In the State Court the Company filed an answer to the complaint and a motion to dismiss and motion for summary judgment. The Union moved to dismiss the original complaint on the ground that as unincorporated associations neither the Local nor the International could be sued by name under West Virginia law. Plaintiffs voluntarily entered an order dismissing the unincorporated associations as such and, with leave of court, filed an amended complaint substituting as defendants named individual district and local officers and committeemen.[5]

"To the amended complaint the Company filed an amended answer and also a motion to dismiss. The record before us does not reveal whether the Company filed any supporting legal memorandum. Two of the individually named union official defendants, Titler and Gibson, appeared specially and filed a motion to dismiss. Two other individually named union representative defendants, Lambert and Cordell, also appeared specially filing a joint and several motion to dismiss. The fifth individual defendant, Smith, made no appearance or motion in the State Court. Lambert and Cordell filed a legal memorandum in the State Court in support of their motion to dismiss. In addition to that memorandum, at least two legal memoranda were filed by plaintiffs in the State Court in opposition to the motions to dismiss.

"On March 8, 1965, the State Court entered an order

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[5]"The individual substituted defendants were George J. Titler, Harry T. Gibson, Douglas Lambert, Curtis Cordell (incorrectly named in the amended complaint as 'Curtis Caudill') and Clarence Smith. It appears from the amended complaint in the State Court and from a supporting memorandum filed therein by plaintiffs that Lambert, Cordell and Smith were individual members of the Mine Committee of the Local Union who were charged with the responsibility of representing plaintiffs at two stages of the grievance procedure and who actively participated in that procedure. Titler and Gibson were District representatives of the Union who are alleged by plaintiffs in their amended complaint in the State Court to have represented plaintiffs in the grievance process at each stage." The Fourth Circuit found there was privy between individuals as union officials and representatives in the State Court and Unions in the instant action (Pet. App. 38-40).

sustaining the motions to dismiss filed on behalf of the Company and the individual defendants and dismissing plaintiffs' action 'as to all defendants. . . .' In its order the State Court assigned no reasons for the action it took, made no findings or conclusions, and filed no opinion.

"On May 11, 1965, the nine plaintiffs petitioned to appeal to the Supreme Court of Appeals of West Virginia and filed a lengthy supporting brief. On May 24, 1965, the State Supreme Court refused plaintiffs' petition for appeal without assignment of any reason. No review was sought by plaintiffs in the Supreme Court of the United States, although plaintiffs had urged throughout the State Court proceedings that their cause of action was grounded upon a federal statute—section 301(a) of the Labor Management Relations Act of 1947—and that state and federal courts had concurrent jurisdiction under that act.[7] Plaintiffs instead instituted the instant action in the District Court on July 14, 1965."

8. The Fourth Circuit Affirmed the Dismissal On the Ground That the State Court's Dismissal Was a Judgment On the Merits, Barring this Action Under the Doctrine of Res Judicata.

As already noted, the Fourth Circuit directed counsel to file supplemental briefs on the *res judicata* issue.[8]

Analyzing fifteen dismissal grounds raised by the several defendants in the state court action, the Fourth Circuit concluded, "The State Court's dismissal constitutes a judgment on the merits" (Pet. App. 38) and affirmed

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[6]"Hereinafter referred to as the 'State Supreme Court.'"

[7]Footnote 7 in the Fourth Circuit's opinion (Pet. App. 20) is omitted.

[8]Union Respondents attached, as an appendix to their Supplemental Brief in the Fourth Circuit, (1) Petitioners' Reply Memorandum to that filed on behalf of two individual defendants in the state circuit court; (2-3) Petitioners' Petition for an Appeal filed in the Supreme Court of Appeals of West Virginia and their supporting memorandum; (4) the order of said Supreme Court denying the petition; and (5) the "Memorandum and Authorities on Behalf of Plaintiffs Pertaining to the Several Issues Herein". These documents have been certified by the Fourth Circuit's Clerk and are on file in this Court's Clerk's Office.

the trial court's dismissal of Petitioners' complaint under the doctrine of *res judicata* (Pet. App. 18).

Observing that after the umpire rendered an unfavorable decision, the National Labor Relations Board refused to issue any complaint in a series of cases filed with it; that Petitioners next instituted suit in the state court, in which they filed detailed and lengthy memoranda and were afforded and took advantage of every " 'fair opportunity to litigate a claim before a court which [had] jurisdiction over the parties and the cause of action' "; and that having failed in their efforts in the trial and highest courts of West Virginia, Petitioners "elected not to seek review in" this Court but "opted instead to reinstitute their action in the District Court, a tribunal whose jurisdiction over the action was concurrent with that of the State Court" (Pet. App. 24). Pertinently, as the Fourth Circuit pointed out (Pet. App. 35), "plaintiffs' complaint" in the federal district court was substantially the same as the complaint in the state court, and similarly Petitioners' amended complaint in the state court was substantially the same as Petitioners' proposed amended complaint in the district court (Pet. App. 35). And, the Fourth Circuit agreed with the district court that the proposed amended complaint, rejected by the district court, does not materially differ from the original one filed in the district court (Pet. App. 35).

Thus, to the Fourth Circuit it was "fundamental that this last in the series of actions" required application of the *res judicata* doctrine (Pet. App. 24). Its opinion recites that "the cause of action which plaintiffs are seeking to maintain in the federal courts on this appeal has all of the hallmarks of a cause of action long since expired" (Pet. App. 22).

The Fourth Circuit observed that, of the four requirements essential to bar a subsequent suit, Petitioners argue

that one has not been met, namely, "the State Court judgment was not rendered on the merits" and that therefore the *res judicata* doctrine does not bar the instant suit (Pet. App. 25).[9]

Though noting that neither the West Virginia trial nor highest courts assigned any specific reason for their respective actions, the Fourth Circuit declared, "The absence of a written opinion does not, however, prevent application of the doctrine of *res judicata*" (Pet. App. 26). The appellate court then turned to "pleadings in the prior action . . . to show what matters were in fact litigated and determined" thereon (Pet. App. 26) and to support its conclusion (Pet. App. 38) that the "State Court's dismissal constitutes a judgment *on the merits*."

9. The Fourth Circuit's Holding Pertaining to Res Judicata In Relation to the Unions' Grounds of Dismissal.

The Allegations of Fraud In the State Court and In the District Court Were Substantially the Same.

In the state court, as the Fourth Circuit observed (Pet. App. 33), individual defendants urged that the complaint failed to allege circumstances constituting the alleged fraud with particularity as required under West Virginia Rules of Civil Procedure.[10] Though professing dismissal on that basis "was not on the merits" and would not extinguish the cause of action and plaintiffs would be entitled to cure the defect by alleging fraud with requisite specificity, the Fourth Circuit noted Petitioners would

[9]The Fourth Circuit delineated the four grounds as (1) The former judgment must have been both valid and final; (2) the cause of action asserted in the subsequent litigation must be the same cause of action as was asserted in the former litigation; (3) The former judgment must have been rendered on the merits; and (4) The parties to the former judgment must stand in such relationship to the parties to the subsequent action as to entitle the latter to the benefits and subject them to the burdens of the prior litigation (Pet. App. 25).

[10]Section 9(b) of the State Rules provides that:
"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally. Negligence may also be averred generally."

not be entitled "to bring the within subsequent complaint *if the latter again failed" to meet the specificity requirement,* pointing to Restatement of Judgments, Section 50, Comment d, that:

> "[I]f judgment for the defendant was rendered on a demurrer to the complaint in which a necessary allegation was omitted, and the plaintiff brings a new action in which the complaint is substantially the same as in the prior action, the plaintiff is not entitled again to litigate the question whether the complaint is sufficient" (Pet. App. 34-35).

Citing the same Comment, the Fourth Circuit declared dismissal on the ground that fraud was not alleged with sufficient specificity would be *res judicata* as to that matter and a complaint filed in a subsequent suit which alleged fraud with only the same degree of specificity would be barred (Pet. App. 34-35). *Based upon a comparison of the fraud allegations in the state court's amended complaint with those contained in the original and amended complaints filed in the district court in the instant case, the Fourth Circuit found that Petitioners' complaint is " 'substantially the same as* [*the complaint*] *in the prior action' insofar as the allegations of fraud . . . are concerned"* (Pet. App. 35), and that *"plaintiffs have failed to cure that defect in the complaint" filed in the instant case* and assuming that the state court's dismissal was based "on the ground that plaintiffs had not in their complaint alleged the circumstances constituting fraud with sufficient particularity" the Fourth Circuit declared the instant complaint "would be barred" under *res judicata* (Pet. App. 35).

Res Judicata.

The Fourth Circuit noted that "All of the individual defendants filing motions . . . contended that the State Court suit was barred under the doctrine of *res judicata*"; and it

held "a dismissal on this issue would be on the merits", even if erroneous (Pet. App. 26-27).

The Statute of Limitations and Estoppel.

Dismissal based upon the statute of limitations, pressed by the individual defendants in the state court, as in the district court, would have been "on the merits", declared the Fourth Circuit (Pet. App. 26-27). Similarly, because one of Petitioners had appeared and participated in the arbitration procedure in behalf of himself and other Petitioners, two individual defendants argued that Petitioners were estopped from bringing suit, and the Fourth Circuit declared, "This ground, if adopted by the State Court, would go to the merits". (Pet. App. 27).

Misjoinder of Parties.

The Fourth Circuit agreed with two individual defendants that a dismissal on the ground they were not necessary, proper or indispensable parties "would constitute a judgment on the merits as to them" although, declared the Fourth Circuit, that would not deprive Petitioners of their right to maintain suit against all necessary, proper or indispensable parties; yet, the appellate court stated such ground would not explain dismissal as to the Company or the remaining individual defendants and therefore "does not eliminate the possibility that the dismissal" as to them "was on the merits" (Pet. App. 28-29).[11]

[11] Rejected as grounds for dismissal in the Fourth Circuit's opinion were asserted grounds that the umpire was an indispensable party, the lack of whose presence prevented the state court from rendering a final judgment (Pet. App. 27); that two individuals (Titler and Gibson) were misjoined as parties defendant (Pet. App. 29-30) and that the same individuals were dismissed for failure of the complaint to state a cause of action as to them (Pet. App. 30).

The Fourth Circuit also rejected the view that dismissal in the State Court was based upon the contention of two individual defendants that the umpire was an indispensable party, the lack of whose presence prevented the State Court from rendering a final judgment, or because they were not alleged to be parties to the fraud, or that plaintiffs' action was not cognizable in West Virginia courts or that exclusive jurisdiction was in the National Labor Relations Board (Pet. App. 27, 28-29, 36, 37).

10. The Fourth Circuit's Holding Pertaining to Res Judicata in Relation to Company's Grounds of Dismissal.

The Fourth Circuit expresses the view that had the State Court accepted the Company's views that the state action was not a proper appeal from the arbitration award, or that plaintiffs had no right to move to set aside that award, or that individual employees could not maintain, in their own names, actions under the Act's Section 301, the determinations would have been on the merits (Pet. App. 26, 27-28).[12]

ARGUMENT

I. THERE IS NO SUBSTANTIAL FEDERAL QUESTION PRESENTED.

A. The Lack of a Written Opinion Does Not Render Res Judicata Inapplicable.

The crux of Petitioners' complaint herein is that the State Court dismissed their complaint by entry of an order without supporting opinion or assignment of reasons; and it is observed that in Petitioners' Questions Presented (Pet. 2) the words, "without assignment of any reason and without an opinion" are italicized.

Despite Petitioners' complaint as above set forth, it is to be noted that Petitioners do not challenge the validity of the Fourth Circuit's citations of *Napa Valley Elec. Co.* v. *Railroad Comm.*, 251 U.S. 366, 373 and *Saint Lo Construction Co.* v. *Koenigsberger*, D.C. Cir., 174 F.2d 25, 27 (1949) to support its holding that *"The absence of a written opinion does not, however, prevent application of the doctrine of res judicata"* (Pet. App. 26).

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[12]The Fourth Circuit regarded as "highly unlikely" that the State Court would have dismissed the action as to the Company and the individual defendants on the ground that plaintiffs' sole cause of action was against the Union (Pet. App. 28). It rejected, as a basis for *res judicata*, the Company's position in the State Court that the Union was a necessary party to the action (Pet. App. 30-31), and Company's contention that exclusive jurisdiction over plaintiffs' cause of action lay in the Federal courts (Pet. App. 36).

Likewise, Petitioners do not challenge the Fourth Circuit's holding that "The pleadings in the prior action are available to show what matters were in fact litigated and determined in the prior litigation" (Pet. App. 26).

Petitioners, of course, selected the West Virginia Circuit Court as the forum in which to litigate their cause of action; yet Petitioners cite no West Virginia authority to support their contention that a written opinion or the assignment of reasons by the court was prerequisite to the entry of an order of dismissal. Indeed, even where the West Virginia Constitution (Article VIII, Section 5) specifically requires that where a judgment or decree is reversed or affirmed by the Supreme Court of Appeals of West Virginia, every point fairly arising upon the record of the case shall be considered and decided and the reasons therefor shall be concisely stated in writing, the West Virginia Supreme Court has consistently held that the constitutional provision is only *directory*.[13] *State* v. *Smith*, 119 W.Va. 347, 193 S.E. 573; *Horner* v. *Amick*, 64 W.Va. 172, 61 S.E. 40 (1908). The constitutional provisions pertaining to circuit court jurisdiction contain no requirement that a judgment on the pleadings accompany the entry of an order thereon. Indeed, the record before the Fourth Circuit showed that in their Petition For An Appeal filed by Petitioners in the Supreme Court of Appeals of West Virginia, Petitioners noted that

> "The trial court did not make any written findings of fact or render any written opinion—hence, from the order appealed from it is impossible to ascertain if the trial court passed upon the question

[13]Constitution of West Virginia, Article VIII, Section 5, reads:

"When a judgment or decree is reversed or affirmed by the supreme court of appeals, every point fairly arising upon the record of the case shall be considered and decided; and the reasons therefor shall be concisely stated in writing, and preserved with the record of the case; and it shall be the duty of the court to prepare a syllabus of the points adjudicated in each case concurred in by three of the judges thereof, which shall be prefixed to the published report of the case.

> of whether or not the complaint stated a cause of action."[14]

Yet, the Supreme Court of West Virginia denied the petition seeking an appeal, noting in its order of denial that the circuit court record accompanied the petition and that there was a note of argument in support thereof.[15] Like the circuit court's order, the West Virginia Supreme Court's order refusing the appeal was accompanied by neither opinion nor assignment of reasons for such refusal.

B. The Fourth Circuit Properly Applied the Doctrine of Res Judicata, Contrary to Petitioners' Contentions.

Petitioners assert that res judicata is inapplicable because it cannot be ascertained if dismissal in the State Court was based upon jurisdiction or upon the ground that the complaint failed to state a claim upon which relief could be granted.

Petitioners concede, as indeed they must, that failure to state a proper cause of action calls for a judgment on the merits. Cf. *Bell* v. *Hood,* 327 U.S. 678, 682; *Baker* v. *Carr,* 369 U.S. 186.

But, Petitioners erroneously assume that a final judgment as to jurisdiction may not be *res judicata.* Eminent authors on Federal Rules demonstrate Petitioners' fallacy as to jurisdiction. Barron and Holtzoff (Wright's Rules Ed.), Vol. 3, p. 15, recites that

> *"A final judgment determining a question of jurisdiction may be res judicata."*

Similarly, Moore's Federal Practice, Vol. 1B, p. 655-56, declares that *"res judicata* is not restricted to a valid

[14]See II of Appendix filed by Union Respondents to their response to Petitioners' supplemental brief filed in the Fourth Circuit, now in the Clerk's office of this Court.

[15]See IV of Appendix filed by Union Respondents to their response to Petitioners' supplemental brief filed in the Fourth Circuit, now in the Clerk's office of this Court.

judgment that deals solely with the merits; it extends to and includes matters in abatement, such as jurisdiction of the *subject matter,* federal jurisdiction, jurisdiction over the res, jurisdiction over the defendant, venue and related matter."

The foregoing discussion makes it clear that it is of no pertinency whether the State Circuit Court premised its dismissal order upon jurisdiction or the ground of the complaint's failure to state a claim, or both. It is relevant, however, to note (1) Petitioners sought a review in the West Virginia Supreme Court on both grounds[16] and (2) both grounds were presented to the State Supreme Court which denied Petitioners' application. As the Fourth Circuit declared (Pet. App. 24), "Having failed in their efforts in the trial and highest courts of the State of West Virginia, plaintiffs elected not to seek review in the United States Supreme Court and opted instead to reinstitute their action in the District Court", and that "It seems to us rather fundamental that this last in the series of actions taken by plaintiffs requires application of the doctrine of *res judicata*" (Pet. App. 24).

C. The Fourth Circuit's Opinion Demonstrates Fully That Petitioners Have Been Accorded Due Process of Law.

Contrary to Petitioners' plaint that the Fourth Circuit's decision prevents adjudication of whether or not an arbitrator's award, induced by fraud, threats or collusion, can be directly attacked in court by individual mem-

[16]In their Petition For An Appeal filed in the Supreme Court of West Virginia, it is recited that "Issues raised by these motions are: (1) Does the Circuit Court of Wyoming County, West Virginia, have jurisdiction of the subject matter of the action? (2) Does the amended complaint state a cause of action against the defendants or any of them?" The appeal petition's prayer seeks reversal "upon the two issues of jurisdiction of the subject matter and cause of action" and that the action be remanded "if this Honorable Court should find that the Circuit Court . . . has jurisdiction but in the opinion of this Court said complaint does not state a cause of action that the trial court be reversed and the action remanded with leave to plaintiffs to amend such complaint." See *ante,* p. 18, footnote 14.

bers of a local union under a collective bargaining agreement and that the Fourth Circuit's "Refusal to permit prosecution of the case in the District Court violates 'due process' " (Pet. 12), references to the Fourth Circuit's opinion, the accuracy of which has not been challenged as to its recitals, abundantly demonstrate the lack of merit in Petitioners' positions.

Initially, it is noted that the district court's opinion in the instant case declared that "This Court is fully cognizant of the fact that if the arbitrator or umpire were actually deceived as a result of fraudulent conduct on the part of defendants, then we would have no other choice but to vacate the decision" (Appendix A, p. 4a). The district court, however, was concerned with whether the averments of fraudulent conspiracy among the defendants as alleged in the complaint were sufficient (Appendix A, p. 4-5a); and the Fourth Circuit noted, with reference to the issue of *res judicata*, that the individual defendants had urged the State Court that the complaint failed to allege the circumstances constituting the alleged fraud with particularity as required under the West Virginia Rules of Civil Procedure (Pet. App. 33). Even though the Fourth Circuit noted that Petitioners would have been entitled to cure the defect in the pleading by alleging fraud with requisite specificity, it declared that a comparison of the degree of specificity with which fraud was alleged in the amended complaint filed by Petitioners in the State Court with the allegations in both the district court's complaint and proffered amended complaint, showed that the allegations of fraud in the State Court and in the district court were substantially the same. Thus, it is evident that it is not a question of determining, as Petitioners press upon this Court, the question of whether an arbitrator's award induced by fraud, threats or collusion can be attacked, which the district court has already answered in the affirmative, but as the Fourth

Circuit notes, "plaintiffs have failed to cure that defect in the complaint filed herein and, upon that assumption, would be barred from bringing this action under the principles of *res judicata*" (Pet. App. 35).

The Fourth Circuit's opinion tells this Court that when the umpire rendered an unfavorable decision, Petitioners filed charges with the National Labor Relations Board in a series of cases but such charges were rejected; and though the Fourth Circuit declared that the Board's refusal "does not constitute an adjudication for purposes" of *res judicata*, such refusal serves "to highlight the opportunities which have been available to plaintiffs to have their grievances authoritatively adjudicated" (Pet. App. 22-24). In addition, as the Fourth Circuit's opinion shows, Petitioners have had their day in court, not only in the State Circuit Court, but also in the State Supreme Court. Again, as the Fourth Circuit shows, abundant opportunity was accorded Petitioners in the Federal District Court to cure the defect of lack of specificity as to the fraud claimed by Petitioners. Since the dismissal motions in the State Court included Petitioners' failure to state a claim, and the West Virginia Supreme Court rejected Petitioners' position that the State Circuit Court had erred in dismissing by reason thereof, the Fourth Circuit's implementation of the doctrine of *res judicata* was proper.

Petitioners emphasize that the State Court had concurrent jurisdiction with federal courts over the cause of action premised upon Section 301(a), Labor Management Relations Act, 1947; and although, as this Court's Rule 19, Paragraph 1. (a) lists as one of this Court's reasons for governing a review on certiorari is where a state court has decided a federal question of substance not theretofore determined by this Court or has decided it adversely to this Court's applicable decisions, Petitioners chose, as the Fourth Circuit recited, in lieu of

seeking review in this Court, to reinstitute their cause of action in the federal district court. Petitioners thus placed themselves in a posture for application of the doctrine of *res judicata.*

In addition to its conclusion that the complaint's allegations in the State Court proceedings and those in the district court were substantially the same, *the Fourth Circuit agreed with the district court that Petitioners' proposed amended complaint did not materially differ from the original one filed in the district court (ante,* p. 12). Moreover, as already noted (*ante,* pp. 13-16), the Fourth Circuit's opinion included various other grounds which would serve as a basis for implementation of the *res judicata doctrine.*

CONCLUSION

For the foregoing reasons, it is submitted that the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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November 9, 1967

APPENDIX A

(District Court)

MEMORANDUM OPINION

In this action, plaintiffs seek to recover damages from the defendant corporation for wrongful discharge, in violation of the collective bargaining agreement, and joins the defendant unions for their alleged conspiracy with the corporation against them in procuring their discharge. Jurisdiction is asserted by virtue of Section 301(a) of the Taft Hartley Act, 29 U.S.C.A. 185(a).

On September 24, 1962, defendant corporation gave each of the plaintiffs a written notice that he was discharged as an employee at its Juneau Mine in Wyoming County, West Virginia, but that it would permit each to work under protest, until the discharges were approved by recourse to the grievance or arbitration procedure provided for in the existing collective bargaining agreement.

The collective bargaining agreement provided, in pertinent part, the following provisions concerning grievances:

"Management of Mines

"The management of the Mine, the direction of the working force, and the right to hire and discharge are vested exclusively in the Operator, and the United Mine Workers of America shall not abridge these rights. It is not the intention of this provision to encourage the discharge of Mine Workers, or the refusal of employment to applicants because of personal prejudice or activity in matters affecting the United Mine Workers of America.

"Discharge Cases

"When a Mine Worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case arising under the method of settling disputes herein provided for.

APPENDIX

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APPENDIX

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[District Court]

MEMORANDUM OPINION

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>
> "When a Mine Worker has been discharged from his employment and he believes he has been unjustly dealt with, it shall be a case arising under the method of settling disputes herein provided. In

all discharge cases should it be decided under the rules of this Agreement that an injustice has been dealt the Mine Worker, the Operator shall reinstate and compensate him at the rate based on the earning of said Mine Worker prior to such discharge. Provided, however, that such case shall be taken up and disposed of within five days from the date of discharge.

"Settlement of Local and District Disputes

"Should differences arise between the Mine Workers and the Operators as to the meaning and application of the provisions of this Agreement, or should differences arise about matters not specifically mentioned in this Agreement, or should any local trouble of any kind arise at the mine, an earnest effort shall be made to settle such differences immediately,

"1. Between the aggrieved party and the mine management.

2. Through the management of the mine and the Mine Committee.

3. Through District representatives of the United Mine Workers of America and a commissioner representative (where employed) of the coal company.

4. By a board consisting of four members, two of whom shall be designated by the Mine Workers and two by the Operators.

5. Should the board fail to agree, the matter shall, within thirty (30) days after decision by the board, be referred to an umpire to be mutually agreed upon by the Operator or Operators affected and by the duly designated representatives of the United Mine Workers of America, and the umpire so agreed upon shall expedi-

tiously and without delay decide said case. The decision of the umpire shall be final. Expenses and salary incident to the services of an umpire shall be paid equally by the Operator or Operators affected and by the Mine Workers.

"A decision reached at any stage of the proceedings above outlined shall be binding on both parties hereto and shall not be subject to reopening by any other party or branch of either association except by mutual agreement."

Upon notification of their discharge, plaintiffs, in accordance with the collective bargaining agreement described above, submitted their claims under the grievance provisions. The parties being unable to agree at the fourth stage of bargaining, called in an umpire, Edward L. Lynch, to decide the matter. His final decision of January 31, 1963, affirmed the discharge effective as of January 2, 1963.

Plaintiffs, in an attempt to evade this binding decision by the umpire, sought recourse on three different occasions through the National Labor Relations Board. On each attempt, however, the Board refused to issue a complaint. In a further attempt to vacate and set aside the umpire's decision, plaintiffs brought suit in the Circuit Court of Wyoming County, West Virginia, on February 21, 1964, alleging fraud and conspiracy on the part of the corporation and the union. Motions to dismiss were filed by the defendants and that court sustained the motions and dismissed the action as to all defendants. Thereafter, plaintiffs twice sought review of this dismissal in the Supreme Court of West Virginia, but were unsuccessful on both occasions.

Plaintiffs now come into this court setting forth substantially the same averments as contained in the complaints before the State court and the National Labor Relations Board. Defendants, again, move to dismiss the complaint on various grounds, but at this juncture, it is

necessary to consider only the question of whether the ruling of the umpire is subject to review by this court.

As previously mentioned, the collective bargaining agreement provided that the decision of the umpire shall be final. Defendants contend, therefore, that such final decision by the umpire is not subject to review by the courts. We must agree that this contention is fully supported by the authorities. *United Steelworkers* v. *American Manufacturing Co.*, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed. 2d 1403 (1960); *United Steelworkers* v. *Warrior & Gulf Co.*, 363 U.S. 574, 80 S.Ct. 1347 (1960); *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960); *Jefferson City Cabinet Co.* v. *International Union, etc.*, 313 F. 2d 231 (6th Cir. 1963). Arbitrators under collective bargaining agreements are indispensable agencies in a continuous collective bargaining process. They sit to settle disputes at the plant level that require for their solution knowledge of the custom and practices of a particular industry as reflected in particular agreements. The Federal policy of settling labor disputes by arbitration would be undermined if courts had the final say on the merits of the awards. *United Steelworkers* v. *Warrior & Gulf Co.*, supra; *United Steelworkers* v. *Enterprise Wheel & Car Corp.*, supra.

This Court is fully cognizant of the fact that if the arbitrator or umpire were actually deceived as a result of fraudulent conduct on the part of the defendants, then we would have no other choice but to vacate the decision. 5 Am. Jur. 2d, Arbitration and Award Section 175 (1962); *Dickinson* v. *Chesapeake & O. R. Co.*, 7 W. Va. 390 (1874). However, from a careful review of the averments of fraudulent conspiracy among the defendants as alleged in the complaint, we must hold that they are insufficient, in that they are not made with the degree of certainty, particularity, and detail that is required. Rule 9(b) of the Federal Rules of Civil Procedure specifically provides that,

"In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

Just what the alleged fraud and conspiracy consisted of, the supposed purpose and intent thereof, and what resulted therefrom, in particular what effect this fraudulent conspiracy had on the decision of the umpire, is not shown here. Cf. *McMullen* v. *Lewis*, 32 F. 2d 481 (4th Cir. 1929). The complaint herein merely deals with conclusions; in essence stating that due to the conspiracy, the corporation was able to create a record before the umpire that contained grossly false accusations against the plaintiffs, false intimations of non-existent violence and the impression that plaintiffs were leaders of wildcat strikes. Much stronger should the facts of fraud be alleged where a plaintiff is collaterally attacking the binding decision of an umpire, approved in effect by the N.L.R.B. and a State court decision, as is the case here.

Furthermore, the fact that a settlement of this dispute was not made at the fourth stage of the grievance proceedings, which only involved the alleged fraudulent parties, tends to negate rather than substantiate intent of fraud and conspiracy on the part of the defendants.

Believing, therefore, that the Federal policy is to uphold the decisions of the umpires in arbitration decisions wherever possible and further believing that plaintiffs' averments of fraudulent conspiracy among the defendants were not alleged with sufficient particularity so as to necessitate disturbance of the final decision, it is, accordingly, not subject to review by this court.

So viewed, defendants' motions to dismiss being well taken, will be granted and plaintiffs' complaint dismissed. An appropriate order may be presented.

Dated April 4, 1966.

ORDER, SUPREME COURT OF APPEALS OF WEST VIRGINIA

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 24th day of May, 1965, the following order was made and entered, to-wit:

John Thomas, et al.

vs.

Consolidation Coal Company, a corporation, (Pocahontas Fuel Company Division), and George J. Titler, et al.

On a former day, to-wit, May 11, 1965, came the petitioners, John Thomas, William McCoy, John Salters, Isaac Sizemore, Ray Trantham, Ellis Coleman, Jr., Lee Looney, John Yates and Charles Taylor, by D. Grove Moler, their attorney, and presented to the Court their petition praying for an appeal from a judgment of the Circuit Court of Wyoming County rendered in this action on the 8th day of March, 1965, with the record therein accompanying the petition, and note of argument in support thereof, which being seen and inspected by the Court the appeal prayed for is refused.

A true Copy

Attest:

Clerk Supreme Court of Appeals